United Nations AT/DEC/1198

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1198

Case No. 1087: MASSI
1088: MASSI
1142: MASSI

Against : Le Secretary General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Dayendra Sena Wijewardane;

Whereas, on 1 December 2002, Primo Massi, a former staff member of the United Nations, filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 16 April 2003, the Applicant again filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 30 June 2003, the Applicant, after making the necessary corrections, again filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 1065 rendered by the Tribunal on 26 July 2002. The Application contained pleas which read, in part, as follows:

> "II. **Pleas:**
>
> The Applicant is requesting the Administrative Tribunal to reconsider its Judgement No. 1065 which was rejected and order the United Nations to comply with [the Staff Regulations and Rules] and pay damages equivalent to ***3 years' salary plus costs*** due to (i) opposite and contradictory decisions and long delays by the Administration from 1995 to 1999 and for not having complied *and still not complying* with its staff rules 106.2 (a) (viii), 109.4 under regulation 9.3 & annex III, 110.4 and articles 11.1 (c), 11.2, 11.3, 12.2(d) of Appendix D and (ii) for not having given to [the] Applicant ***the guarantee of a regular***

procedure as referred to in Chapter X. The Applicant respectfully also draws the attention of the Administrative Tribunal to item 7 below "***new fact***" and requests that Appendix D, in particular articles 11.1 (c) and 11.2 (d) be correctly and properly applied.

...

7. **New fact:** Violation of Article 11.1 (c) ... as [the] Applicant is:

(a) not earning the same amount of the final annual pensionable remuneration plus dependency allowance as when he was in office - which should have been granted more so in view of the high percentage of his disability;

(b) his *dependency allowance* (for his mother) since [the] Applicant's retirement has fallen into oblivion as he is certainly not receiving dependency allowance equivalent to US $ 300.- and

(c) the *10% under article 11.2 (d) cannot be allowed to stand as such a small percentage* cannot possibly be applicable in a case of a 72% disability and

(d) whatever the amount granted under this heading, it should obviously increase in the same proportion as [the] Applicant's pension and/or cost of living increase."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2003 and periodically thereafter until 31 January 2004;

Whereas the Respondent filed his Answer on 30 January 2004;

Whereas the Applicant filed Written Observations on 25 May 2004;

Whereas the facts in the case were set forth in Judgement No. 1065.

Whereas the Applicant's principal contention is:

In view of the additional information and explanation provided by the Applicant, the Tribunal should reconsider his case.

Whereas the Respondent's principal contentions are:

1. The Applicant's request for revision of judgement is without merit.

2. The Applicant failed to introduce any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgement No. 1065 was rendered.

3. The Applicant is seeking to introduce a new claim based on a decision from May 2002 which matter was not under consideration in Judgement No. 1065. The appropriate course of action is for the Applicant to initiate a new appeals process.

The Tribunal, having deliberated from 27 October to 24 November 2004, now pronounces the following Judgement:

I. This is the Applicant's fourth Application to the Tribunal. In it, he requests revision of Judgement No. 1065, *Massi* (2002), rendered in response to his first three Applications, which were consolidated.

II. The Tribunal recalls that the Applicant was seriously injured during an operation to remove demonstrators from the grounds of the United Nations and remained disabled for life. Upon expiration of his sick leave, the Applicant's fixed-term appointment was not renewed. The Tribunal, in the Judgement whose revision is requested, rejected all pleas submitted by the Applicant in his three prior Applications. Firstly, the Tribunal decided that the Secretary-General had not violated the Applicant's rights by failing to renew his fixed-term contract because, barring any special circumstances, a staff member is not entitled to renewal of his contract, pursuant to staff rule 104.12 (b) (ii). In the Applicant's case, no such circumstance existed. Secondly, the Tribunal found that the Administration had correctly calculated, pursuant to article 11.3 of Appendix D, on the recommendation of the Advisory Board on Compensation Claims (ABCC) approved by the Secretary-General, an indemnity equivalent to a 72 per cent loss of function of the whole person as a result of the incident cited above. In addition, the Applicant had obtained the maximum authorized number of sick leave days. Lastly, with regard to the third Application, the Tribunal found that the Applicant was wrong to contest the recovery of a sum paid to him as a disability benefit that had been awarded to him as a result of an arithmetical error in his favour, and that he should therefore refund the amount. Furthermore, he had no right to any compensation for what he considered to be the long delay in deciding his case, which was justified by the complexity of the issues raised.

Against that background, the Applicant requests revision of judgement. On the one hand, he submits a number of facts that were before the Tribunal in the earlier cases; on the other hand, he claims that there is a new fact, i.e., the decision taken by the ABCC on 20 May 2002, adopted at its 408th meeting.

III. The Tribunal again recalls the very restrictive conditions under which an Application for revision can succeed. Article 12 of the Statute of the Tribunal provides that:

> "The Secretary-General or the Applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The Application must be made within 30 days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the Application of any of the parties."

As the Tribunal stated in Judgement No. 1014, *Al Ansari* (2001),

> "By virtue of article 12 of the Statute, for an Application for a revision of a judgement to be admissible, the Applicant must establish four things:
>
> (1) The existence of a fact;
>
> (2) That the 'fact' was unknown to the Tribunal and the party claiming revision when the judgement was given;
>
> (3) That such ignorance was not due to negligence; and,
>
> (4) That the 'fact' is of such a nature as to be a decisive factor in the case." (para. VII. See also Judgements No. 357, *Sforza-Chrzanowski* (1985); No. 556, *Coulibaly* (1992); No. 669, *Khan* (1994); No. 672, *Burtis* (1994); No. 896, *Baccouche* (1998); and No. 1055, *Al-Jassani* (2002).)

The Tribunal must first determine whether this case meets the requirements for a revision of judgement.

IV. The Tribunal must first of all state, once again, that a request for revision cannot be a means to obtain from a new judgement what was not obtained from the first one. As previously stated in Judgement No. 894, *Mansour* (1998),

> "the Tribunal's powers of revision of a judgement are strictly limited and may be exercised only upon compliance with the conditions set forth in ... No party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation" (para. II).

With respect to the facts invoked by the Applicant, the Tribunal regrets having been forced yet again to review a statement of known (old) facts that had been sufficiently taken into consideration in Judgement No. 1065. Furthermore, the Tribunal notes a lack of seriousness in the submission of old annexes that had been studied in connection with earlier cases: annexes 1 to 22, which the Applicant transmitted to the Tribunal, are all dated before the end of 1999. The date of the Judgement is 2002; all those documents were therefore known and thus completely irrelevant in terms of new facts.

What then is the status of the ABCC recommendation of 20 May 2002? *A priori* one could say that the ABCC recommendation, upon which the Applicant bases his claim, is a *fact*. Nevertheless, the information provided in the case shows clearly that *the fact was not unknown to the Tribunal* or to the party requesting revision. That decision was taken before 26 July 2002, when the Judgement was rendered, and was transmitted to the Applicant on 27 September of the same year and received by him, according to his statements, on 29 November, although it is true that the decision was not challenged in the three initial Applications, as it came later. Furthermore, the Applicant himself recognizes that the recommendation was transmitted directly to the Tribunal on 10 June 2002. It therefore cannot be a new fact unknown to the Tribunal.

It is true that on 1 July 2002 the Applicant sent his comments on the document to the Tribunal in writing. In that letter he refers to

> "this ... decision (ABCC's 408th recommendations) together with a worksheet of the calculation under article 11.2 (d) which I do not agree with. This calculation takes into account only a 10 [per cent] award and only a 72 [per cent] thereof for a permanent (partial) disability ... There is no reason why this calculation should be allowed to stand. Furthermore, no medical board [as] requested by me on 19 December 1996 has yet been convened to determine the degree of disability (i.e. whether partial or total)."

Indeed, this letter, which has been submitted to the Tribunal in this Application, had not been submitted before the first Judgement, as is stated by the Applicant in his Application:

> "On 11 July 2002, the Executive Secretary of the Administrative Tribunal stated that Applicant's communication of 1 July 2002 [was] irreceivable as it was not submitted within the time frame of five working days counted from the date of the commencement of the session".

Might this document constitute a new fact that would allow the initiation of proceedings for revision? The answer is clearly in the negative. In fact, that the Tribunal knew of the ABCC recommendation of 20 May 2002 prior to its rendering of Judgement No. 1065 is not contested, even if the record of the case did not contain the Applicant's criticisms of the recommendation. The Tribunal does not view those comments as a new fact. The decisive factor is the Tribunal's prior knowledge of the recommendation by the Administration concerning the Applicant's situation, rather than its lack of knowledge of the Applicant's comments thereon, which were submitted after the expiration of the time limit.

The Tribunal must also reply to the Respondent's argument that the Applicant, in contesting the ABCC recommendation, is seeking to submit a new Application. In his own words:

> "the Respondent respectfully submits that the Applicant is seeking to introduce a *new claim* and not a 'new fact'. Therefore, the Respondent respectfully submits that if the Applicant wishes to contest the calculation of annual compensation payable pursuant to Article 11.2 (d) of Appendix D, he should initiate a new appeals process, instead of seeking revision of a Judgement." (Original emphasis.)

The Tribunal does not agree with this analysis and does not believe that it is sound practice to consider the request as a new Application.

V. What then, is the Applicant alleging? The Applicant contests the manner in which the administration calculated his compensation for disability and requests that it should be correctly calculated in accordance with Appendix D, in particular articles 11.1 (c) and 11.2 (d) thereof. It is true that the Applicant seeks to reopen the question of the recognized percentage of his disability, the validity of which was confirmed by the Tribunal, by challenging the methods used in calculating the amount of compensation. In reality, the Applicant is seeking more compensation than he is receiving and, being dissatisfied, seeks to maintain that it is not in conformity with the rules. According to his Application,

> "[a]pplication and calculation of article 11.2 (d) of Appendix D, more so since the dollar has now declined and his pension is approximately 50 per cent less than he was earning in 1999 - date of separation - his pension now is certainly not in conformity with that article".

However, given that the Tribunal has already adopted a position as to the validity of the compensation owed to the Applicant, there really is no new claim before it.

VI. Procedures exist to guarantee due process and justice, but they must not be diverted from their purpose. Had the Administration's decision not been known to the Tribunal, and therefore open to consideration as a new fact, this Tribunal might have been able to take it up with a view to revising or interpreting its Judgement, inasmuch as the ABCC recommendation of 20 May 2002 is only one of the means of implementing the decisions adopted by the Tribunal in Judgement No. 1065 and it would be contrary to the proper administration of justice to request that new litigation should be initiated, given the time limits involved in this type of procedure.

VII. To allow the Applicant to feel that justice has been done and to prevent the dispute from being drawn out indefinitely - the accident having happened in 1995 - the Tribunal will not simply state that there is no new fact, which would put an end to the Applicant's claims without it being necessary to enter into the merits of the case. The Tribunal wishes further to state that the recommendation - which is not a new fact - is in absolute conformity with Judgement No. 1065 and that it constitutes a correct application of the texts invoked. The Tribunal hereby only confirms Judgement No. 1065. In fact, after leaving the United Nations upon the non-renewal of his contract, the Applicant received both annual compensation from the ABCC and a disability benefit, as is stated in Judgement No. 1065. He is, of course, not allowed to draw both amounts concurrently, and the relevant documentation states that in accordance with the provisions of Annex III of the Staff Regulations and Rules, the amount to be paid to him under Appendix D may be reduced because of the disability benefit paid by the Pension Fund, as was also stated in the aforementioned Judgement. When articles 11.1 (c) and 11.2 (d) of Appendix D are combined, the Applicant is entitled to 72 per cent of two thirds of his final pensionable remuneration as compensation for his disability. However, article 4 of Appendix D provides for "Relation to benefits under the United Nations Joint Staff Pension Fund", and articles 4.1 (a) and (b) are relevant here:

> "*Article 4.1*
>
> (*a*) Subject to the provisions of paragraph (*b*) of this article, there shall be deducted from any compensation payable under articles 10.2, 11.1 (*c*)

> and 11.2 (*d*) of these rules the amount of all benefits paid to the staff member or to persons entitled through him under the Regulations of the Joint Staff Pension Fund, other than any part of such benefits deriving solely from voluntary contributions paid by the staff member himself under article XVIII of those regulations, provided that such benefits have become payable as a result of the same death, injury or illness which gave rise to the entitlement to compensation under these rules;
>
> (*b*) Deductions made under paragraph (*a*) above shall in no case have the effect of reducing the compensation otherwise payable under articles 10.2, 11.1 (*c*) and 11.2 (*d*) to less than 10 per cent thereof, provided always that the total annual amount payable both under these articles and under the Regulations of the Joint Staff Pension Fund does not exceed the final pensionable remuneration of the staff member plus the annual dependency allowances to which he was entitled at the date of the cessation of his employment."

It is therefore clear that the rules establish a higher and a lower limit to the combination of the compensation for disability under Appendix D and the disability benefit paid by the Pension Fund. The total amount payable may not be more than the staff member's final pensionable remuneration, and it may not be less than 10 per cent of the amount to which he would be entitled under Appendix D. The Tribunal cannot but affirm that all calculations were correctly made, in accordance with those rules, by the ABCC in its recommendation of 20 May 2002.

VIII. For the foregoing reasons, the Application is rejected in its entirety.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary